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No. _____

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

KAREN SUE RIGGIN
Plaintiff

v.

STEVEN ROSS RIGGIN
Defendant

Court of Appeals no. for the State of Kansas 85-58358-A

ON PETITION FROM THE SUPREME COURT OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

Steven Riggin
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28 pp

I

QUESTIONS PRESENTED

1. What standard of due process are the State Courts of last resort required to uphold.

2. Whether the Kansas Courts denied the equal protection guarenteed by the Fourteenth Admendment to the defendant-appellant by placing the minor child in the sole custody of the mother.

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TABLE OF AUTHORITIES

Santosky V. Kramer, 455 US 745, 71 L ed 2d 59

Wisconsin V. Yoder, 406 US 205, 32 L ed 2d 15

Stanley V. Illinois, 405 US 645, (1972)

NO. _____

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COURT OF APPEALS NO. 85-58358-A

ON PETITION FROM THE SUPREME COURT OF THE STATE OF KANSAS

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OPINIONS BELOW

The opinion from the Kansas Court of Appeals in case 58358 affirmed in part, reversed in part and vacated in part the district courts decision in Riggin V. Riggin 83D2727. By affirming the decision of the Kansas District Court for Sedgwick County Kansas the Court of Appeals shortened the Summer Visitation of the minor child from 12 weeks to 2 weeks.

The defendant Steven Ross Riggin filed a PETITION FOR REVIEW in the Supreme Court of Kansas which was denied. Inasmuch as the Supreme Court of Kansas is the Court of last resort petition for a writ of Certiorari is made in accordance with Rule 17. The PETITION FOR REVIEW is reference in Appendix A-1.

JURISDICTION

The opinion of the Kansas Court of Appeals Affirming the order of the district court shortens the period of summer visitation from 12 weeks to 2 weeks under Kansas Statute K.S.A. 60-1610. The respondent Steven Ross Riggin was also put in to jail by the so-called District Court for expressing support for the Bill of Rights in the United States Constitution. The judgement was entered Oct. 2, 1986. Pursuant to Title 28 U.S.C. § 2101 the present petition for a writ of certiorari was required to be filed within 90 days of the entry of this judgement. The jurisdiction of this court is invoked under Title 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides due process and equal protection clauses. The United States Supreme Court has held that the State Courts must uphold the Fourteenth Amendment.

STATEMENT OF THE CASE

Plaintiff and defendant were married from September 1972 until they were granted a divorce by the District Court of Kansas in June of 1984. During their marriage one child Jennifer Marie Riggin was born.

Kansas Statute K.S.A. 60-1610 provides that "neither parent shall have a vested interest in the custody of the child." The Kansas District court via the Honorable Elliot Fry placed the minor child in the sole custody of the mother stating that "there was evidence that the father would have a more difficult time raising the

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child than the mother."

In October of 1984 the defendant Steven Ross Riggin filed a motion to increase the summer visitation period of the minor child with the father from 2 weeks to 12 weeks. This motion was granted by the Honorable Ray Hodge. Judge Hodge noted that there had been a material change of circumstances as required by K.S.A. 60-1610 (A) in order to modify the custody order of the court.

The plaintiff made a motion through her attorney for a hearing to reconsider the modification of the child custody order by the court. This motion was heard in the District Court of Kansas on April 4, 1985 before the Honorable Robert D. Watson, Judge of Position F of the Eighteenth Judical District of Kansas.

The Defendant objected to the motion because no material change of circumstance as required by K.S.A. 60-1610 had been shown. Page 9 lines (6-23) transcript of the proceedings.

During the proceedings the Honorable Robert D. Watson asserted the court was not concerned with the Bill of Rights page 55 line (22-26). The so-called court also placed the

Defendant in jail for his support of the First amendment and Second Amendment to the United States Constitution.

The court ordered that the period of summer visitation be shortened from 12 weeks to 2 weeks. The defendant appealed the case to the Kansas Court of Appeals. The modification of the child custody order was affirmed. The defendant petitioned the Supreme Court of Kansas the petition for review was denied.

ARGUMENT

The essential issue in this petition is whether the State Supreme Court has held the District Court under its supervision to a proper standard of due process.

The activities that occurred in the Courtroom on April 4, 1985 included statements from the bench which represented improper judical conduct, jailing the litigant for his support of the United States Constitution and asserting that the court was not concerned with the Bill of Rights.

By allowing the District Court to use

this tribunal to shorten the summer visitation period of the minor child from 12 weeks to 2 weeks the District Court effectively terminated the parential rights of the father. The instant case presents an appropriate avenue for this Court to consider what standard of due process is to be applied before effective parential rights termination can be achieved.

In Santosky V. Kramer, 455 U.S. 745 (1982) the United States Supreme Court affirmed that the constitutional right of parental autonomy is constitutionally protected. It also defined the due process clause held required by the Fourteenth amendment could not be met by the state without a showing of "Clear and convincing evidence before parental rights termination. The perponderance standard was held inconsistent with due process.

A further issue presented in the case at bar is whether the Kansas Courts denied the Constitutional rights of the Defendant-appellant in placing the minor child in the sole custody of the mother.

The Supreme Court has long recognized the

existence of certain fundamental rights that, although not specifically mentioned in the Bill of Rights, are basic values implicit in the concept of ordered liberty: and are thus accorded the full protection reserved for the enumerated rights. Althouth the right of parental autonomy is not specifically mentioned in the Constitution, the Supreme Court cases dealing with parental rights suggest they are so basic that they must be considered fundamental.

The right of the bilogical father to raise the child even though the traditional bond of marriage is absent in the family setting was established in Stanley V. Illinois 405 U.S. 645 (1972).

By shortening the summer visitation period from 12 weeks to 2 weeks the District Court has acted in an unconstitutional, discriminatory and capricious manner which is harmful to the emotional well being of the minor child and is particularly harsh and cruel in view of the geographical seperation from the defendant. Thus the discriminatory action is an infringement on

the parental prerogative of the defendant to transmit religious values.

The United States Supreme Court affirmed in Wisconsin V. Yoder, 406 U.S. 205, 32 L ED 2nd 15 the right to free excercise of religion when their is no basis for a state interest that will overbalance the right of the individual to religious convictions. In Wisconsin V. Yoder the Supreme Court upheld parental claims, based on grounds of both religious and parental autonomy, to exempt children from state compulsory education. More specifically the court in Yoder said that when the interests of parenthood are combined with a free excercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competancy of the State is required to sustain the validity of the State's requirement under the First Amendment.

By placing the minor child in the sole custody of the mother the District Court has failed to uphold the equal protection embodied in the Fourteenth Amendment to the United States Consti-

tution.

In light of the need for these important questions to be resolved it is necessary for the court to grant certiorari in this case.

CONCLUSION

For the reasons stated herein, petitioner respectfully prays that this court grant the instant petition for a writ of certiorari.

APPENDIX A-1

Documents Referenced

1. Court of Appeals Court Document Filed OCT. 2, 1986

2. Petition for Review of Appellant Steven Ross Riggin filed in the Supreme Court of the State of Kansas

3. Transcript of the proceedings of the record of case 83D2727 before the Honorable Robert D. Watson, Judge of Position F of the Eighteenth Judical District of Kansas, April 4, 1985.

Appendix B

NOT DESIGNATED FOR PUBLICATION

NO. 58,358

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE
OF

KAREN SUE RIGGIN
Appellee,

and

STEVEN ROSS RIGGIN
Appellant

Memorandum Opinion

Appeals from Sedgwick District Court: ROBERT D. WATSON, Judge and KENNETH C, KIMMEL, judge. Opinion filed May 29, 1986. Case No. 58,358 is affirmed in part, reversed in part and dismissed in part.

Steven Riggin, In pro per

ANDREW B. Fletcher, Of Fletcher & Mathewson, P.A., of Wichita, for Appellee.

Before PARKS, P.J., REES., and David F. Brewster, District Judge, assigned.

Per Curiam: These consolidated appeals involve post-divorce motions concerning property settlement, child custody and child support. In Case No. 58,358, Steven Ross Riggin appeals a district court order (1) "reinstating" the original custody, visitation and support order: (2) increasing prospectively the amount of child support: (3) finding appellant in direct contemp of court; (4) requiring appellant to make child support payments by money order or certified check; and (5) denying his motion for change of custody.

The facts are familiar to the parties on appeal and need not be recited herein except as may be pertinent.

In case no. 58,358, appellant first contends the court erred in reinstating the original visitation order incorporated in the divorce decree. Specifically, appellant argues that (1) interim visitation orders made by Judge Hodge after the divorce but before rehearing by Judge Watson were res judicata; and

(2) The visitation orders having been thus modified by Judge Hodge, the burden was on appellee to show a material change of circumstance before Judge Hodge could reinstate the original visitation order. We disagree.

A parent not granted custody of his minor child is entitled by statute to "reasonable visitation rights, " unless the court finds after a hearing that visitation would endanger seriously the child's physical, mental, moral or emotional health. K.S.A. 1985 Supp. 60-1616(a). Unlike determinations of child custody or support, which for modification require a showing of material change of circumstances, the court may modify and order granting or denying visitation rights whenever modification would serve the best interests of the child. K.S.A. 1985 Supp. 60-1616(c). On review, this court will not disturb orders concerning child custody and support in the absence of affirmative showing of abuse of discretion. Treiber v. Stong, 5 Kan. App. 2d 392, 397-98, 617 P.2d 114,

rev. denied 228 Kan. 807 (1980). Moreover, abuse of discretion will only be found when no reasonable person would take the view adopted by the trial court. Stayton v. Stayton, 211 Kan. 560, 562, 506 P. 2D 1172 (1973).

In this case,the decree of divorce on July 20, 1984, granted sole custody of the parties' minor child to appellee but awarded appellant two weeks' summer visitation. A few months after the divorce, appellant moved for modification of the custody orders and Judge Hodge, on October 16 and 22 1984, ordered an increase in the amount of visitation allowed. The journal entry of that order was not filed until March 20, 1985, however, and one day later appellee filed a motion for rehearing. Judge Watson heard the motion and ordered that the original visitation order be reinstated.

We have review the record and deem appellee's "Motion for Rehearing" to be timely filed motion to alter or amend pursant

to K.S.A. 60-259(f). That said, it follows that Judge Hodge's October orders were not res judicat; that doctrine applies only when a case has been finally decided on the merits (U.S.D. No. 464 v. Porter, 234 Kan. 690, 693, 676 P.2d 84 1984), and a judgement is not final until the court is through with it. In re Casebier , 129 Kan. 853, 859, 284 Pac. 611 (1930). In any event, K.S.A. 1985 Supp. 60-1610 (c) confers upon the trial court continuing jurisdiction to modify visitation orders, so res judicata would not preclude Judge Watson from reinstating the original visitation order so long as the basis of his reinstatement order was not relitigated facts and so long as the order served the best interests of the child. See generally Hill v. Hill, 228 Kan. 680, 682-83, 620 P.2d 1114 (1980). We hold the trial court did not abuse its discretion in reinstating the original visitation order.

Second, appellant contends the trial court erred in finding him in direct criminal contempt of court and in placing him in jail. We agree.

Without addressing appellant's specific arguments, we have reviewed the record and find the trial court failed to enter of record the conduct constituting the contempt and the statement of whatever defense appellant made. K.S.A. 20-1203. Those requirements are jurisdictional and their absence renders the order finding the appellant guilty of contempt void. Wallace V. Weber, 134 Kan. 201, 202-03, 5 P. 2d 855 (1931). We hereby vacte that portion of the judgment. See generally State V. Pondexter, 225 Kan. 425, 590 P. 2d 1074 (1979); In re Gambrell, 160 Kan. 620, 164 P 2d 122 (1945), reh. denied 161 Kan. 4 (1946).

Next, Appellant contends the trial court abused its discretion in prospectively increasing appellants child support payments. Specifically, appellant's principal contention is that the trial court's finding of material change of circumstances is not supported by substantial competent evidence. We agree.

The sole evidence presented by appellee in support of her motion to increase child support was that appellant was earning $700 per week, which earnings pursuant to sedgwick County Bar Association guidelines call for $320 of child support per month. The record contains no evidence of appellee's financial needs and circumstances Although appellee's counsel referred to appellant's earnings as a "great increase" the record is devoid of evidence showing what appellant earned at the time of the divorce. In short, we find no substantial competant evidence to support a finding of material change of circumstances. See Simmons v. Simmons, 223 Kan. 639, 642, 576 P. 2d 589 (1978); Carlton v. Carlton, 217 Kan. 681, 538 P. 2d 727 (1975). The order prospectively increasing the amount of child support to be paid by appellant is reversed. See also Thompson v. Thompson, 205 Kan. 630 634, 470 P. 2d 787 (1970): Dunn v. Dunn 3 Kan. App. 2d 347, 595 P. 2d 349 (1979).

Fourth, appellant attacks the trial courts order that all child support payments be made by certified check or money order as impermissibly infringing upon his first amendment rights. We disagree.

Appellant cites no controlling authority and we find none. However, Kansas courts have recognized that the constitutional rights of the parents of minor children may sometimes be appropriately infringed when consistent with the best interests of the children. See Carlson v. Carlson, 8 Kan. App. 2d 564, 567, 661 P. 2d 833 (1983). As such, we believe the trial court's order here furthers (1) the State's substantial interest in seeing that child support payments are promptly paid, and (2) the court's interest in excercising its inherent power of maintaining decorum and integrity. Accordingly, and although the trial courts order burdens appellant's rights of free expression, we hold that

burden not unconstitutionally impermissible in light of the important interests involved.

Fifth, appellant argues the trial court abused its discretion in denying his child custody modification motion. Specifically, he asserts that by failing to award him joint custody of his child the court has infringed his constitutional right of "parental autonomy," including the parental prerogative of the father to transmit values and religious convictions to the daughter." We disagree.

We recognize that a parent's right of custody and control of his children is a liberty interest protected by the due process clause of the Fourteenth Amendment. Thus, before an order concerning custody of a child may be made, due process requires notice and an opportunity to be heard. In re Wicks, 10 Kan. App. 2d 124, 127, 693 P. 2d 481(1985). However, K.S.A. 1985 Supp. 60-1610 (a) (2) permits the trial court to change or modify prior custody orders only when a material change of circumstances is shown. As with child support orders, matters

concerning child custod are entrusted to the trial court's sound discretion and will not be disturbed on appeal absent a showing of abuse thereof. Simmons v. Simmons, 223 Kan. 639.

In this case, appellant presented no evidence of change of circumstances at the hearing on appellee's motion for a rehearing. Moreover, the record reveals no arbitrarily disregarded evidence which would disturb the negative finding that appellant failed to meet his burden of proof, and also disproves his contention that he was denied due process. We hold the trial court did not abuse its discretion in refusing to modify the original custody order.

As his final issue in the appeal in Case No. 58,358, appellant argues the trial court erred in retroactively increasing the amount of child support due from the time of the divorce until the October orders of Judge Hodge. We disagree.

It is true that unpaid child support payments become a judgment when due. In addition such child support payments may be modified at any time circumstances render such a change proper, but the modification operates prospectively only. K.S.A. 1985 Supp. 60-1610,(a)(1); Brady v. Brady , 225 Kan. 485, 488, 592 P.2d 865 (1979). Although relief from child support payments is sometimes available under K.S.A. 60-260(b), that section applies only where relief is sought because of facts existing at the time of the decree which, if known to the court, would have brought about a different result. Otherwise, Proceedings to modify provisions of a divorce decree based on matters occuring after the decree are to be brought under K.S.A. 1985 Supp. 60-1610 and are subject to its limitations.

In this case, Judge Hodge retroactively modified past due child support payments upon a finding that appellant had not known of appellee's impending move to California at the time of the divorce. As mentioned above,

that finding did not become final, however, and Judge Watson amended it by finding that appellant had known of appellee's move. Judge Watson's finding is abundantly supported by the record and the divorce decree. As such, K.S.A. 60-260 did not apply and Judge Hodge lacked jurisdiction in granting appellant relief from past due child support payments. His order so stating was thus void and Judge Watson acted properly in "reinstating" the amount of the judgment for child support already due from July through October. We see no error.

Appendix D

FILED

COURT OF APPEALS, STATE OF KANSAS, } ss.

APP. DOCKET NO. 89-S-2727 No. 85-58358-A
Dist. Court No. 86-S-2727 85-58693-A
OCT 2 12 05 PM '86

The State of Kansas, to the District Court within and for the County of Sedgwick in the State of Kansas, Greeting:

18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY

WHEREAS, In a certain civil, ~~criminal~~ action lately pending before you, wherein

Karen Sue Riggin plaintiff

and

Steven Ross Riggin defendant

a judgment was rendered by you against the said Defendant

from which judgment said Defendant

prosecuted an appeal in the Court of Appeals within and for the State of Kansas;

AND WHEREAS, on 29 May 19 86 on consideration of the said appeal

it was ordered and adjudged by the said court of appeals that the judgment of the District Court be Case 58,358 is affirmed in part, reversed in part and vacated in part; Case No. 58,693 is aff irmed in part and dismissed in part, attested true copy opinion attached

and that the said recover against the said

Dollars for costs herein expended and have execution therefor, and said judgment having now become final:

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Court of Appeals, according to law.

Costs

Fees of Clerk of the Appellate Courts	$ Paid
Record	
Transcript	
Other costs	
Total	$

WITNESS my hand and the seal of said Court of Appeals affixed hereto, at my office, in the City of Topeka, on the SEP 29 1986 day of A.D. 19

Lewis C. Carter

LEWIS C. CARTER, Clerk of the Appellate Courts.

MANDATE RECEIVED BY CLERK
TRIAL JUDGE NOTIFIED Date:

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Appendix C

IN THE SUPREME COURT OF THE STATE OF KANSAS

Karen Sue Riggin, Appellee,

v.

Steven Ross Riggin, Appellant.

No. 85-58358-A

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Date September 12, 1986

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

cd